SUPREME COURT, U.S.
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No. 96-1079 OF THE CLERK

In The
Supreme Court of the United States
October Term, 1996

JOHANNA TREVINO, a minor,
Petitioner and Cross-Respondent,

vs.

DARYL GATES, TOM BRADLEY, HERBERT BOECKMANN, JERRY BROOKS, JOSEPH CALLIAN, MICHAEL SIRK, RICHARD SPELMAN, GARY STRICKLAND, JAMES TIPPINGS, RICHARD ZIERENBERG, MANUEL AVILA, CHARLES BENNETT, BRIAN DAVIS, JOHN FRUGE, JOSEPH FREIA, EDWARD GUIZA, PETER SANCHEZ, REGINALD WEAVER, JAMES TOMA, C.S. WINSTON, PHILLIP WIXON, GARY ZERBEY, JOEL WACHS, JOY PICUS, JOHN FERRARO, ZEV YAROSLAVSKY, RUTH GALANTER, ERNANI BERNARDI, NATE HOLDEN, MARVIN BRAUDE, HAL BERNSON, MICHAEL WOO, JOAN FLORES, all in both their individual and official capacities, and CITY OF LOS ANGELES,
Respondents and Cross-Petitioners.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

When calculating attorney's fees to be awarded to prevailing plaintiffs pursuant to 42 U.S.C. § 1988, should district courts be precluded from considering evidence of the hourly rates paid to private attorneys employed by public entities to litigate and defend civil rights cases?

PARTIES IN THE ACTION

Johanna Trevino, a minor, by and through her next friend, her grandmother, Filadelfia Cruz, was the plaintiff-appellant in the court below.

Daryl Gates, Tom Bradley, Herbert Boeckmann, Jerry Brooks, Joseph Callian, Michael Sirk, Richard Spelman, Gary Strickland, James Tippings, Richard Zierenberg, Manual Avila, Charles Bennett, Brian Davis, John Fruge, Joseph Freia, Edward Guiza, Peter Sanchez, Reginald Weaver, James Toma, C.S. Winston, Philip Wixon, Gary Zerbey, Joel Wachs, Joy Picus, John Ferraro, Zev Yaroslavsky, Ruth Galanter, Ernani Bernardi, Nate Holden, Marvin Braude, Hal Bernson, Michael Woo, Joan Flores and the City of Los Angeles were defendants-appellees in the court below.

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CROSS-PETITION FOR WRIT OF CERTIORARI

Daryl Gates, et al., cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 99 F.3d 911 (9th Cir. 1996) and is attached as an Appendix to the Petition for Writ of Certiorari filed by the petitioner Johanna Trevino.

JURISDICTION

Cross-Petitioners were appellees in this case in the United States Court of Appeals for the Ninth Circuit. The opinion and judgment was entered on November 1, 1996. No petition for rehearing was filed in the Court of Appeals. This cross-petition is timely filed within 90 days of the date judgment was entered. ***28 U.S.C. § 2101(c), Rule 13-4, Rules of the U.S. Supreme Court***. The jurisdiction of this Court is invoked pursuant to ***28 U.S.C. § 1254***.

STATUTES INVOLVED

42 U.S.C. § 1988(b)

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], title VI of the Civil Rights Act of 1964 {42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Petitioner and Cross-Respondent Johanna Trevino was two and one-half years old at the time this action was commenced and brought through "her next friend, her grandmother," Filadelfia Cruz. In a complaint filed April 1, 1992, petitioner alleged that, seven days before she was born, her father was one of four men who participated in a "commercial burglary" at a McDonald's restaurant in Sunland, California, and that he was shot and killed by Los Angeles Police Officers. Petitioner alleged that the actions of the defendants under color of state law deprived her of rights secured by the United States Constitution and were actionable pursuant to ***42 U.S.C. § 1983***. Jurisdiction of the district

court was invoked pursuant to ***28 U.S.C. §§ 1331*** and ***1343***.

Petitioner's grandmother had previously sued the City of Los Angeles on account of the death of her son (petitioner's father) and that litigation was concluded adversely to the City in ***Gomez v. Gates***, 804 F.Supp. 69 (C.D. Cal. 1992). Although no compensatory damages were awarded in that action, nominal damages in the amount of $1.00 and punitive damages against the Chief of Police and eight officers, totaling approximately $44,000, were assessed. The City and more than thirty municipal defendants, including members of the City Council, had been dismissed or dropped from the case either prior to or during trial.

This action was filed a few days after the verdict in ***Gomez***. Counsel for petitioner and cross-respondent, who had previously represented the plaintiffs in ***Gomez***, addressed a letter to members of the Los Angeles City Council informing them that ten Council members had previously been named in the ***Gomez*** case because they had voted to indemnify the Chief of Police for punitive damages assessed in yet another civil rights case [***Larez v. City of Los Angeles***, 946 F.2d 630 (9th Cir. 1991)]. Counsel for petitioner and cross-respondent advised council members to "think twice" before making the same mistake, and promised to dismiss council members voting *not* to indemnify Chief Gates in ***Gomez*** from the newly filed ***Trevino*** action (the case at bar). Notwithstanding this "advice," a majority of members of the City Council voted to

satisfy the ***Gomez*** judgment, including punitive damages assessed against Chief Gates, after making the findings required by ***California Government Code § 825(b)***. This lawsuit was thereafter served on defendants and depositions of City Council members noticed.

The complaint in this matter alleged that members of the City Council, who were named in the complaint in both their individual and official capacities, had violated petitioner's constitutional rights by ratifying, acquiescing in, or affirming the misconduct which enabled the death of petitioner's father. Petitioner asserted that the City's policy makers had knowingly, or with gross negligence or deliberate indifference, created, maintained, ratified or failed to correct an official policy permitting the occurrence of the types of wrongs complained of.

On August 10, 1992, in a published order and opinion [***Trevino v. Gates***, 798 F.Supp. 621 (C.D. Cal. 1992)], the court ruled that absolute legislative immunity did not protect the council members from suit. Respondents and Cross-Petitioners appealed this decision to the United States Court of Appeals for the Ninth Circuit, and the opinion was affirmed. (***Trevino v. Gates***, 23 F.3d 1480 (9th Cir. 1994). Cross-Petitioner's petition for writ of certiorari to this court was denied. (***Wachs v. Trevino***, 115 S.Ct. 32 (1994).)

In further proceedings in the trial court, the district court held that petitioner and cross-respondent was collaterally

estopped from relitigating punitive damages and was bound by the verdict in ***Gomez***. The defendant officers stipulated to a punitive damages award of $9,109 which was the highest amount awarded to any plaintiff in ***Gomez***.

Summary judgment was entered for the City and Councilmembers on the ground of qualified immunity, and the only issue remaining to be litigated was the compensatory damages due petitioner and cross-respondent from the defendant police officers. After a jury trial, petitioner and cross-respondent received a nominal damages award of $1 plus the $9,109 previously stipulated in punitive damages from the officers. Petitioner and cross-respondent moved for attorney's fees in the amount of $495,885 under ***42 U.S.C. § 1988*** and the district court awarded $25,000.

On appeal to the Ninth Circuit, the judgment was affirmed with regard to the entry of summary judgment for the Councilmembers and the City, and with regard to the trial court's rulings. This decision is currently the subject of the Petition for Writ of Certiorari in this Court. However, the district court's award of attorney's fees was reversed. The Ninth Circuit concluded that it was error for the district court to have relied on evidence of the hourly rate paid by the City to private lawyers retained to represent the City and municipal employees in civil rights lawsuits. While the court held that the district court had not abused its discretion in reducing the rate requested by Trevino's counsel because the issues were

not complex, it nevertheless held that it should not have relied on hourly rates paid to private defense counsel when calculating a reasonable hourly rate to be paid plaintiff's counsel. (Petition for Writ of Certiorari, Appendix at p.27a.) The court found that lawyers retained by the City to defend civil rights lawsuits are not "in the same legal market" as private plaintiff's lawyers who litigate civil rights cases and are not in fact acting as "private" counsel. (Petition for Writ of Certiorari, Appendix, pp.27a-28a.)

ARGUMENT

I.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

A petition for writ of certiorari will be granted "only for compelling reasons." (***Rule 10, Rules of the U.S. Supreme Court***.) A grant of certiorari is justified in the instant case because the Ninth Circuit opinion is in conflict with an opinion from the First Circuit, and also because the Ninth Circuit has decided an important question of federal law which has not been, but which should be, settled by this Court.

The Circuits of the federal courts are in fact split on the proper weight to be accorded evidence of the hourly rate paid to private defense counsel retained by public entities to defend civil rights litigation. While some circuits agree with the Ninth

Circuit that such evidence is irrelevant to calculating a reasonable hourly rate for plaintiff's lawyers, at least one circuit in ***Andrade v. Jamestown Housing Authority***, 82 F.3d 1179 (1st Cir. 1996), has held that there is no reason, all other factors being equal, why the hourly rate paid to plaintiff's lawyers should exceed that paid to defense lawyers. (***Id.*** at 82 F.3d 1190.) Indeed, it is illogical to require a district court calculating a reasonable hourly rate to ignore the rates paid by what is arguably the largest single consumer of hourly legal services in civil rights litigation: the governmental entity.

The existence of the conflict concerning the admissibility of defense attorney hourly rates illuminates the need to grant this cross-petition for certiorari in order to settle an important question of federal law. This Court's directive to the lower courts to calculate a reasonable hourly rate based on the "prevailing market rates in the relevant community" [***Blum v. Stenson***, 465 U.S. 886, 895 n.11, 79 L.Ed.2d 891, 104 S.Ct. 1541 (1984)], has been variously interpreted throughout the federal circuits without much consistency or uniformity. A variety of interpretations co-exist and have contributed to growing confusion and frustration for district courts asked to calculate a reasonable hourly rate.

While three general groups of cases interpreting the concept of "prevailing market rate" can be isolated, the definitions being developed at the district court and circuit level are neither complementary nor consistently applied and

demonstrate the need for some clarification of ***Blum*** or additional guidance in this area. The three groups of cases define a prevailing market rate by focusing on:

1. the hourly rate charged by the attorney seeking the fee to clients paying for hourly legal services; or

2. the hourly rate awarded to the attorney seeking the fee by other judges in civil rights cases, or the hourly rate awarded to other plaintiff's civil rights lawyers; or

3. the hourly rate charged by other similarly situated practicing attorneys for similar services.

Depending on which definition is adopted, and how the relevant fee market is defined, the evidence which a district court may consider when fixing an hourly rate varies widely. Specifically, if the relevant community is narrowly defined to include only attorneys representing plaintiffs in civil rights cases, then the hourly fees paid by governmental entities to private attorneys defending such lawsuits can be or is excluded. If, on the other hand, the market is more broadly defined to include all lawyers of similar skill performing similar services, then there is no reason to exclude evidence of hourly rates charged by defense lawyers. Such evidence may not be dispositive, or may have to be adjusted to account for factors such as discounting, but it is surely not irrelevant.

This, then, is the question presented by this cross-petition: for purposes of fixing a reasonable hourly rate and awarding attorney's fees, is the prevailing market rate to be defined

narrowly to exclude hourly fees paid to private lawyers representing governmental defendants, or is it to be defined more broadly to allow for reference to these rates when such evidence is relevant and helpful to the calculation? Cross-petitioner urges this Court to clarify its holding in ***Blum*** to define the relevant market broadly to include all attorneys, including defense attorneys, performing similar services, and to permit district courts to consider fees paid to defense lawyers when such evidence is helpful in fixing a reasonable hourly rate.

II.

A NARROW DEFINITION OF THE RELEVANT FEE MARKET DOES NOT ASSIST A TRIAL COURT IN FIXING A REASONABLE HOURLY RATE.

When an attorney's fee is awarded under the numerous fee-shifting statutes, it is to be calculated by multiplying the number of hours reasonably expended times a "reasonable hourly rate." (***Hensley v. Eckerhart***, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); ***Blum v. Stenson, supra*** at 465 U.S. 888, 104 S.Ct. 1544.) The critical inquiry in determining reasonableness is generally recognized as the "appropriate hourly rate." (***Blum v. Stenson, supra*** at 465 U.S. 895 n.11, 104 S.Ct. 1547 n.11.) The prevailing attorney has the burden of producing evidence that proves the requested rate is in line

with rates prevailing in the community for similar services performed by lawyers of reasonably comparable skill, experience and reputation. (***Ibid.***)

A number of circuits have considered or adopted narrow definitions of the relevant market and thus limit the evidence admissible to assist the trial court in fixing a reasonable hourly rate. An initial trend towards focusing on the rate actually charged by the lawyer seeking the fee to clients paying hourly rates has not been widely adopted but such evidence is still considered relevant and admissible. [See, e.g. ***Andrade v. Jamestown Housing Authority, supra*** at 82 F.3d 1190 ("While an attorney may inform the court's analysis by providing evidence of her customary billing rate...,the court is not obligated to adopt that rate."), ***Public Interest Research Group of New Jersey, Inc. v. Windall***, 51 F.3d 1179, 1185 (3rd Cir. 1995) ("The starting point in determining a reasonable hourly rate is the attorneys' usual billing rate, but this is not dispositive."), ***Rum Creek Coal Sales, Inc. v. Caperton***, 31 F.3d 169, 175 (4th Cir. 1994) ("While evidence of fees paid to attorneys of comparable skill in similar circumstances is relevant, so too is the rate actually charged by the petitioning attorneys when it is shown that they have collected those rates in the past from the client."), ***Hadix v. Johnson***, 65 F.3d 532, 536 (6th Cir. 1995) ("In the case of private attorneys...where an attorney requesting fees has well-defined billing rates, those rates can be used to help calculate

a reasonable rate for a fee award."), ***People Who Care v. Rockford Board of Education***, 90 F.3d 1307 (7th Cir. 1996) ("The attorney's actual billing rate for comparable work is 'presumptively appropriate' to use as the market rate.").]

In other circuits, however, evidence of the rates paid by fee-paying clients to the lawyer seeking the fee is not afforded any particular evidentiary weight and the courts rely instead on "rates customarily paid in the community for similar services." (***Blum v. Stenson, supra*** at 465 U.S. 895 n.11, 104 S.Ct. 1547 n.11.) [See, e.g. ***Schwarz v. Secretary of Health & Human Services***, 73 F.3d 895, 908 (9th Cir. 1995) ("This determination [reasonable hourly rate] 'is not made by reference to rates actually charged the prevailing party.' Id. Rather, the court 'should be guided by the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience and reputation.' (Citation omitted.)"), ***Beard v. Teska,*** 31 F.3d 942, 956 (10th Cir. 1994) ("...the relevant market value is not the price that the particular lawyer chosen may be paid by willing purchasers of his or her services, but rather the price that is customarily paid in the community for services like those involved in the case at hand.").]

A recent trend, however, appears to be reviving (or expanding, depending upon one's viewpoint) the narrow approach to defining the relevant market for purposes of fixing attorney's fees. Many courts have considered evidence

of the hourly rate awarded to the petitioning attorney in other civil rights cases or awarded to other plaintiff's civil rights lawyers in other cases as persuasive on the question of prevailing market rate. In ***Washington v. Philadelphia***, 89 F.3d 1031 (3rd Cir. 1996), for example, the attorney seeking the fee submitted affidavits from other lawyers practicing in Philadelphia in employment discrimination cases, the same type of case prosecuted by the fee-seeking attorney. (***Id.*** at 89 F.3d 1035.) Such evidence was considered "prima facie" evidence of the market rate prevailing in the relevant community. (***Id.*** at 90 F.3d 1036.)

In ***Buffington v. Baltimore***, 913 F.2d 113 (4th Cir. 1990), the court noted that rates charged by general civil litigators should not be "mechanically accepted" by the district court as evidence of the prevailing market rate without corroborating evidence that these rates corresponded to rates charged for *civil rights* litigation. (***Id.*** at 913 F.2d 130.) The court noted that the hourly rates prevailing in the relevant community were best proved by reference to the rate received by other counsel with similar qualifications in comparable cases, recent awards by courts in similar cases, and specific evidence of awards received by counsel seeking the fee. (***Ibid.***)

Additionally, in ***Islamic Center of Mississippi, Inc. v. City of Starkville***, 876 F.2d 465 (5th Cir. 1989), the attorney seeking the fee in a civil rights case submitted affidavits from

other lawyers practicing in the same region stating the "customary charge" for complex civil rights litigation in federal court. (*Id.* at 876 F.2d 467.) This evidence was apparently accepted as proof of the prevailing market rates. (*Id.* at 876 F.2d 469-470.)

In the case at bar, the Ninth Circuit appears to have adopted this reasoning, or at least so narrowly defined the relevant market for purposes of fixing an hourly rate that only evidence of the hourly rates paid to other plaintiff's civil rights lawyers may be admissible. The court notes that the "proper reference point" for determining an appropriate fee award is the "rates charged by private attorneys in the same legal market" as the attorney seeking the fee. (Petition for Writ of Certiorari, Appendix at 27a.) If, as the court states, "private attorneys hired by a government entity to defend excessive force cases are not in the same legal market as private plaintiff's attorneys who litigate civil rights cases," (*Ibid.*), it is difficult to imagine what lawyers, other than "private plaintiff's attorneys who litigate civil rights cases" fit into the "same legal market."

This Court has acknowledged that finding a prevailing market rate for hourly legal services is "inherently difficult" even when dealing with lawyers who actually charge hourly rates. (***Blum v. Stenson, supra*** at 465 U.S. 895 n.11, 104 S.Ct. 1547 n.11.) Such difficulty approaches incomprehensibility when it is applied to specialists who

represent civil rights plaintiffs exclusively and who perform few if any legal services for which they are paid an hourly fee by private clients. By narrowly defining the relevant market to include only plaintiff's civil rights lawyers, the courts utilizing this approach have created an entirely unrealistic and largely fictitious legal community.

In major urban markets, and Los Angeles in particular, there are large groups of lawyers who depend entirely on civil rights cases and ***Section 1988*** fee awards for their livelihood. They do not compete in the "real" marketplace. Many are sole practitioners or work in small, "boutique" law firms, and take only civil rights cases. When they request hourly rates of $350, $400 or $450, they submit affidavits from each other confirming that they are all experts and seasoned practitioners and have been awarded such fees by other judges in other civil rights cases. Or, like counsel in the instant case, they submit an affidavit from a large-firm partner practicing federal anti-trust litigation and billing $350-$550 an hour and insist that all their hours claimed should be compensated at the highest rate, ignoring the fact that clients in the real world only pay a name partner's elevated rates because they expect a partner's involvement in any given case to be limited. (***Finkelstein v. Bergna***, 804 F.Supp. 1235, 1237-1238 (N.D. Cal. 1992).)

Plaintiff's civil rights lawyers are not, in other words, representative of the larger legal community. Limiting the search for a prevailing market rate to hourly rates awarded to

such lawyers alone will not result in a realistic, or particularly rational, hourly rate. The search for a reasonable fee is thwarted, then, by a narrow definition of the prevailing market and leads to the kind of frustration eloquently expressed by the trial judge in this case. (***Trevino v. Gates***, 888 F.Supp. 1509, 1518-1519 (C.D. Cal. 1995).)

III.
THE RELEVANT MARKET SHOULD BE DEFINED BROADLY TO INCLUDE ALL LAWYERS PROVIDING SIMILAR SERVICES, INCLUDING DEFENSE LAWYERS.

Blum instructs that a reasonable hourly rate is to be determined by reference to rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." (***Blum v. Stenson, supra*** at 465 U.S. 895 n.11, 104 S.Ct. 1547 n.11.) A broad interpretation of such language would allow for reference to a wide variety of evidence of rates charged by federal litigators, including hourly rates charged by lawyers representing governmental entities. Indeed, who better to compare a prevailing plaintiff's counsel to than opposing counsel who has a private practice and has been retained by a governmental entity to defend the lawsuit?

At least one circuit agrees that, at least in theory, there is

no reason why a plaintiff's lawyer should receive a higher hourly rate than that paid to counsel representing a defendant. In ***Andrade v. Jamestown Housing Authority, supra*** at 82 F.3d 1179, the First Circuit considered a prevailing attorney's complaint that the trial court had improperly reduced his requested hourly fee. (***Id.*** at 82 F.3d 1189-1190.) The rate requested by counsel was higher than that requested by other plaintiffs in the same case, however, and the circuit court concluded that the trial court had not erred in concluding that counsel had failed to provide adequate evidence supporting the higher rate. (***Id.*** at 82 F.3d 1190.) In the apparent absence of evidence indicating a need for a higher rate, the court concluded that there was no reason to ignore evidence of the rates paid defense counsel. (***Ibid.***)

Courts refusing to consider evidence of rates paid to defense counsel have not offered any theoretical rationale in support of its exclusion, but instead focus on factors which might justify only giving less weight to such evidence. The court in ***Malloy v. Monahan***, 73 F.3d 1012 (10th Cir. 1996) branded such evidence "markedly dissimilar," because defense lawyers are generally paid regardless of their success, they receive regular payment, and are sometimes guaranteed a certain amount of work from insurance pools. (***Id.*** at 73 F.3d 1018-1019.) Plaintiff's lawyers should be paid a higher rate, if this theory is accepted, in order to make up, and compensate them, for those cases they *lose*, a concept which should be

antithetical to the fee-shifting principles of ***Section 1988*** which afford fees only to a prevailing party.

Similarly, the court in ***Brooks v. Georgia State Bd. of Elections***, 997 F.2d 857 (11th Cir. 1993), which the Ninth Circuit followed in the case below, defense rates were deemed "irrelevant" since defense lawyers can charge lower rates because of counterbalancing benefits such as repeat business. (***Id.*** at 997 F.2d 869.) But courts faced with evidence that rates charged by a *plaintiff's* attorney seeking fees are artificially low because of the public interest nature of the work being performed have no difficulty adjusting the rates upward to result in an award in line with the prevailing market rate. (***Islamic Center of Mississippi, Inc. v. City of Starkville, supra*** at 876 F.2d 469; ***Student Public Interest Research Group, Inc. v. AT & T Bell Lab***, 842 F.2d 1436, 1438 (3rd Cir. 1988).) What is the difficulty, then, in permitting a district court to consider evidence of rates charged by lawyers representing governmental entities? If the rates charged are lower than the prevailing market rate because the attorney has negotiated a lower fee in order to obtain repeat business (a fact apparently not in evidence in any of the cases articulating this theory), then a district court is capable of affording the evidence the weight it is due and does not have to be prohibited from even considering it in order to calculate an appropriate hourly fee.

Moreover, the possibility of obtaining repeat business

hardly accounts for the disparity between the evidence of a $175 top hourly rate paid by the City to senior litigators retained to represent it or its employees and the $400 requested by plaintiff or the $550 claimed to be an appropriate hourly rate for top federal anti-trust litigators. In a market as competitive as Los Angeles, the top hourly rate paid to defense counsel representing the City is arguably much closer to the prevailing market rate among those lawyers who must actually make a living charging hourly rates. Only in the artificial and inflated market peopled exclusively by plaintiff's civil rights lawyers can an attorney expect to demand and be awarded a fee of $400 an hour for all work performed in a case, whether he or she is performing highly skilled tasks or simple tasks appropriate to a lower level associate.

Other than these objections, which really go only to the weight to be afforded evidence of hourly rates paid to defense attorneys not to admissibility, the courts have not articulated any justification for refusing to allow a district court to consider such evidence. The Ninth Circuit in this case similarly offered no rationale to support its conclusion that counsel practicing in the private sector who accept a governmental client somehow cease to be "private" lawyers and are no longer operating in the same legal market as private plaintiff's counsel. (Petition for Writ of Certiorari, Appendix at 27a-28a.) If the concepts of relevant market and prevailing market rate continue to be restricted and narrowed until they

ultimately only include plaintiff's civil rights attorneys, there will be no practical limit on the upward momentum of hourly fee requests in civil rights cases because the competing market forces that act on a lawyer's hourly rates can not operate in a vacuum. Evidence of rates paid to defense attorneys and rates charged by other lawyers not dependent on contingency awards is certainly relevant and should be admitted to allow a district court to fix an appropriate fee based on the facts and circumstances of individual cases.

IV.
CONCLUSION

The prevailing market rate should be determined by reference to a broad range of hourly rates paid to lawyers of similar skill performing "similar services" to those performed by plaintiff's civil rights lawyers. Restricting the admissible evidence of comparable hourly rates to only rates awarded to plaintiff's civil rights lawyers by other courts in other cases creates an "incestuous," non-competitive club with exclusive membership which is hardly representative of the greater legal community in which the attorney practices and the case is tried. District courts should be afforded broad discretion to review and consider evidence of many hourly rates and to afford such evidence the weight it is due given the individual circumstances of each case. Given that governmental entities

are probably the largest single consumer of hourly legal services in the civil rights litigation field today, it simply makes no sense to bar trial courts from considering the hourly rates paid to such lawyers when attempting to determine an appropriate hourly rate to be paid to plaintiff's counsel.

For the foregoing reasons it is respectfully requested that this Court grant this Cross-Petition for a writ of certiorari and set aside that portion of the decision of the United States Court of Appeals for the Ninth Circuit limiting the evidence which may be considered by a district court in calculating a reasonable hourly rate to be awarded plaintiff's counsel in a civil rights case.

DATED: January 29, 1997

Respectfully submitted,

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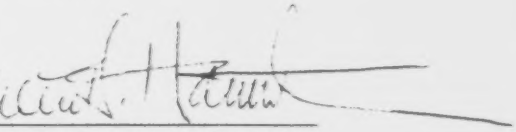
By 
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In The

Supreme Court of the United States

October Term, 1996

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Cross-Petitioners,

v.

JOHANNA TREVINO, a minor,

Cross-Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

Cross-respondent disagrees with cross-petitioners' jurisdictional statement, in which cross-petitioners contend that their cross-petition timely is made.

It appears that the cross-petition properly should be denominated as a *conditional* cross-petition because the judgment of the court of appeals having been entered on November 1, 1996, and the cross-petition having been docketed on February 3, 1997, more than 90 days elapsed between the two dates, and therefore, a straight cross-petition would be out of time, and, pursuant to Supreme Court Rules 13.1 and 12.5, the present cross-petition properly is a *conditional* cross-petition, and its cover should indicate that fact. Rule 12.5.

REASONS FOR DENYING THE CROSS-PETITION

The cross-petition should be denied for these reasons:

1. Cross-petitioners could have, but failed to cite to the court below the case on which they rely for their contention that there is a conflict among the circuit courts of appeals on the issue on which they seek certiorari.

2. There is no conflict among the circuits on the issue of which review is sought.

3. The point of law in the case which cross-petitioners claim creates a conflict among the circuits is dictum.

1. CROSS-PETITIONERS' LACK OF DILIGENCE SHOULD PRECLUDE GRANTING CERTIORARI.

Cross-petitioners rely on *Andrade v. Jamestown Housing Authority*, 82 F.3d 1179, 1189-90 (1st Cir. 1996), as the basis for their contention that a conflict among the circuit

courts of appeals exists, and that on this ground certiorari should be granted.

Andrade was decided by the First Circuit on May 1, 1996, and oral argument in this case in the court below was held on August 6, 1996, three months after the *Andrade* disposition was rendered. The court below did not render its disposition in this action until three months after oral argument, and rendered its disposition on November 1, 1996. As cross-petitioners concede, they neither cited *Andrade* to the court below nor petitioned the court below either for rehearing or rehearing *en banc*.

Cross-petitioners were not diligent in their research and made no attempt to address the alleged conflict among the circuit courts of appeals on the issue of which review is sought, and their lack of diligence should weigh against granting certiorari.

Further, should this Court find there to be a true conflict among the circuits, the appropriate action to take would be to remand the matter to the court below to provide it with an opportunity to address such conflict, as it should have had such an opportunity but for the manner in which cross-petitioners proceeded.

For this reason, certiorari should be denied, or a remand should be granted to permit the court below to address an issue that could have been put before it, but which was not put before it.

2. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS ON THE ISSUE OF WHICH REVIEW IS SOUGHT.

There is no compelling reason to grant certiorari because there is no real conflict among the circuit courts of appeals on the issue of which review is sought.

Though cross-petitioners do not appear to quote from the opinion below on the relevant point, what the court below said clearly does not provide any basis for the claim that there is a conflict among the circuit courts of appeals. All the court below said was this: "the district court should not have relied on the rates paid by the City to private attorneys for defending excessive force cases *as a starting point* for the reasonable hourly rate." *Trevino v. Gates*, 99 F.3d 911, 925 (9th Cir. 1996) (emphasis added).

The court below did *not* preclude use of the rates paid by a government entity to outside counsel in the mix of determining a reasonable hourly rate for plaintiffs' civil rights counsel. Rather, it held that that rate could not be used "as the starting point for [determining] the reasonable hourly rate." There is nothing exceptional at all about this statement, and it does not serve as a basis for contending there is a conflict among the circuit courts of appeals on the hourly rate issue. Furthermore, the holding of the court below is fully consistent with every prior precedent of this court on the fixing of hourly rates under 42 U.S.C. 1988(b), and is not inconsistent with the letter or the spirit of any prior precedent of this court on this issue.

There is no conflict between the Eleventh Circuit's holding in *Brooks v. Georgia State Board of Elections*, 997 F.2d 857, 870 (11th Cir. 1993), and *Andrade*. What *Brooks* held was not that government outside counsel rates could not be used, but that "it was clear error for the district court panel to rely so heavily on the rate paid to opposing counsel." There is nothing exceptional about this holding, and it, too, is fully consistent with the precedents of this Court, it is not inconsistent with the letter or spirit of any prior precedent of this Court, and both the holdings in *Trevino* and *Brooks* fall well within the broad discretion

this Court has accorded to lower courts in fixing Section 1988 hourly rates.

Finally, having told the district court to "reanaly[ze the hourly rate selected in this case] in light of our adoption of *Brooks*," 99 F.3d at 925, the court below also told the district court that it "do[es] not necessarily disagree with the final result reached by the district court and this decision does not preclude the district court from reaching the same decision after consideration of different hourly rates." *Ibid.* Hardly is this the stuff on which certiorari is granted.

3. THE HOLDING RELIED ON IN *ANDRADE* IS OBITER DICTUM, WHICH DOES SERVE AS A BASIS FOR THE CONTENTION THERE IS A CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS.

In *Andrade*, the court held that

> The magistrate set the rate for Andrade's attorney at $125/hr., reasoning that $200/hr. is not a reasonable rate for civil rights litigation in the Providence, Rhode Island, area, Andrade had not provided adequate support for the higher rate, and *no reason presented itself why Andrade's attorney's rate should be more than the defense attorneys' rates.*

82 F.3d at 1190 (emphasis added).

Clearly, the rate was set as it was because of lack of adequate support for a higher rate, which is a complete-in-itself basis for the decision reached, and no reason was presented why the plaintiff's counsel's rate should be higher than the defense rate.

On this record, because even if the holding in *Andrade* were as cross-petitioners contend it is, which it is not, since use of defense counsel rates was not necessary for the court to reach its decision, the supposed holding

is *obiter dictum*, which is not a proper predicate on which to base the claim that there is a conflict among the circuit courts of appeals. There was no adequate support for the higher rate claimed, and there was no reason not to use the defense rate. Thus, there was no *legal* issue in contention on this point.

This holding is an unexceptional, fact-bound ruling, and is not at odds with the holdings in the Ninth Circuit and the Eleventh Circuit. All three holdings in *Brooks*, *Trevino*, and *Andrade* are both correct and in full accord with all precedent from this Court on the point in issue.

CONCLUSION

For the reasons set forth, the cross-petition should be deemed to be a *conditional* cross-petition, and it should be denied because there is no conflict among the circuit courts of appeals on the issue presented, and because the disposition below, on the point raised, is fully consistent with all precedent from this Court on the issue raised.

Dated: February 17, 1997.

Respectfully submitted,

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Supreme Court of the United States

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JOHANNA TREVINO, a minor,

Cross-Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE CITIES OF ALAMEDA, ANAHEIM, ATHERTON, ATWATER, BENICIA, BURBANK, BURLINGAME, CAPITOLA, CHULA VISTA, CORCORAN, COTATI, CULVER CITY, DINUBA, DIXON, EL CAJON, EUREKA, FULLERTON, GARDENA, GLENDALE, HAWAIIAN GARDENS, HAYWARD, HEMET, HUGHSON, HUNTINGTON BEACH, HURON, INDIAN WELLS, IRVINE, KING CITY, LAFAYETTE, LA HABRA, LAGUNA BEACH, LAKEWOOD, LANCASTER, LAWNDALE, LONG BEACH, LOS ALTOS, LYNWOOD, MALIBU, MERCED, MONTEREY, MOUNTAIN VIEW, NAPA, NEWPORT BEACH, OAKLAND, ONTARIO, ORANGE COVE, PALMDALE, PICO RIVERA, PITTSBURG, PLACENTIA, REDDING, REDLANDS, REDONDO BEACH, RIALTO, RIVERSIDE, SAN BRUNO, SAN JOSE, SAN PABLO, SAN RAFAEL, SANTA BARBARA, SANTA CLARA, SANTA PAULA, SANTA ROSA, SOLANA BEACH, SUNNYVALE, THOUSAND OAKS, TORRANCE, TULARE, VERNON, VISALIA, WALNUT, WEST COVINA, WEST SACRAMENTO, WHITTIER, TOWNS OF CORTE MADERA, LOS GATOS, ROSS and SAN ANSELMO IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. When calculating attorney's fees to be awarded to prevailing plaintiffs pursuant to 42 U.S.C. § 1988 (1994), should district courts be precluded from considering evidence of the hourly rates paid to private attorneys employed by public entities to litigate and defend civil rights cases?

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BRIEF OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, subdivision 4, by and through their authorized law officers, the Cities of Alameda, Anaheim, Atherton, Atwater, Benicia, Burbank, Burlingame, Capitola, Chula Vista, Corcoran, Cotati, Culver City, Dinuba, Dixon, El Cajon, Eureka, Fullerton, Gardena, Glendale, Hawaiian Gardens, Hayward, Hemet, Hughson, Huntington Beach, Huron, Indian Wells, Irvine, King City, Lafayette, La Habra, Laguna Beach, Lakewood, Lancaster, Lawndale, Long Beach, Los Altos, Lynwood, Malibu, Merced, Monterey, Mountain View, Napa, Newport Beach, Oakland, Ontario, Orange Cove, Palmdale, Pico Rivera, Pittsburg, Placentia, Redding, Redlands, Redondo Beach, Rialto, Riverside, San Bruno, San Jose, San Pablo, San Rafael, Santa Barbara, Santa Clara, Santa Paula, Santa Rosa, Solana Beach, Sunnyvale, Thousand Oaks, Torrance, Tulare, Vernon, Visalia, Walnut, West Covina, West Sacramento, Whittier, Towns of Corte Madera, Los Gatos, Ross and San Anselmo, political subdivisions of the State of California,[1] hereby respectfully request the Court to grant the cross-petition for writ of certiorari of cross-petitioners Daryl Gates, Tom Bradley, Herbert Broeckmann, Jerry Brooks, Joseph Callian, Michael Sirk, Richard Spelman, Gary Strickland, James Tippings, Richard Zierenberg, Manuel Avila, Charles Bennett, Brian Davis, John Fruge, Joseph Freia, Edward

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[1] *Illinois v. City of Milwaukee*, 406 U.S. 91, 97-98 (1972) (cities and counties are "political subdivisions" of states, and hence citizens of state for purposes of diversity jurisdiction, but as subdivisions of state are not subject to mandatory original jurisdiction of Supreme Court under 28 U.S.C. § 1251(a)).

Guzia, Peter Sanchez, Reginald Weaver, James Toma, C.S. Winston, Philip Wixon, Gary Zerbey, Joel Wachs, Joy Picus, John Ferraro, Zev Yaroslavsky, Ruth Galanter, Ernani Bernardi, Nate Holden, Marvin Braude, Hal Bernson, Michael Woo, Joan Flores, City of Los Angeles, and City of Los Angeles, in the above case. Amici are public entities in the State of California with a collective population of well over one million residents. The decision of the Ninth Circuit Court of Appeals in this case sharply limiting the evidence which may be considered by a district court in determining the market rate for attorney's fees awards under 42 U.S.C. § 1988 has a direct and substantial effect on these amici. In addition, the general principles of law addressed in the Ninth Circuit's opinion and that are presented for review to this Court concerning the parameters of any applicable "market" for purposes of arriving at a fee award under section 1988 are of substantial and continuing concern to these public entities, as well as public entities throughout the country. Therefore, these amici respectfully request the Court to grant the cross-petition for writ of certiorari to decide these important issues.

SUMMARY OF ARGUMENT

It is a reality of modern civil rights litigation that the greatest financial exposure public entities face is derived not from any potential damage award to a plaintiff, whose actual injury may be slight, or who may have obtained some manner of injunctive relief, but from the specter of an award of attorney's fees to the prevailing party under 42 U.S.C. § 1988. In a given case a plaintiff's

damages can, through medical examination, or economic analysis be evaluated for purposes of settlement or eventual trial, but evaluating potential exposure to an attorney fee award is much more problematic. In *Blum v. Stenson*, 465 U.S. 886 (1984), the Court sought to define and limit such awards to "reasonable fees" which it described as "rates . . . in line with those prevailing in the community for *similar services* by lawyers of reasonably comparable skill, experience, and reputation." *Id.* at 895 n.11 (emphasis added). However, as the Court acknowledged, this definition was necessarily artificial and the "market rate" "inherently difficult" to determine. *Id.*

The result has unfortunately been a startling lack of consistency among the federal trial and appellate courts in their interpretation of what constitute "similar services" for purposes of considering or, as indicated in this case, rejecting specific types of evidence in attempting to define the relevant market rate and calculate a fee award under section 1988. Some courts have concluded that all litigation work is essentially similar so as to allow evidence of market rates charged for general litigation to be considered in determining the market rate for civil rights claims. Others have required a plaintiff (or in rebuttal a defendant) to present evidence of the market rate charged for litigating the specific civil rights claim in question. Still other courts have allowed evidence of market surveys encompassing rates charged for legal services in general without regard to whether such fees were charged for litigation or other legal work. While many courts will consider fee awards in similar cases as proof of the market rate, other courts discount the probative value of such evidence.

As indicated by the Ninth Circuit's decision in this case and that of the Eleventh Circuit in *Brooks v. Georgia State Board of Elections*, 997 F.2d 857 (11th Cir. 1993), at least two courts have held that the market for purposes of evaluating a fee award under section 1988 must be limited to what attorneys representing *plaintiffs* receive as an hourly rate. This is because attorneys who represent public entities in such litigation are not in the "same market" as the plaintiffs' attorneys. These decisions are based on the dubious premise that defense attorneys do not provide services similar to those of plaintiffs' attorneys, notwithstanding the fact that putting aside the differing goals each side has in a particular case, the attorneys in such actions perform essentially the same functions, conduct the same discovery and confront the same legal issues. Significantly, at least one other federal appellate court has recognized the inherent similarity in the services performed by defense attorneys and by plaintiffs' attorneys in civil rights litigation and has observed that absent special circumstances, in most cases there is no reason why the hourly rate paid to plaintiffs' lawyers should exceed that paid to defense lawyers. *Andrade v. Jamestown Hous. Auth.*, 82 F.3d 1179, 1190 (1st Cir. 1996).

Certiorari is clearly warranted in this case because the narrow definition of market rates embraced by the Ninth Circuit in *Trevino*, and the Eleventh Circuit in *Brooks*, inherently distorts and inflates the market rate for attorney's fees under section 1988 by excluding evidence of hourly rates paid by the single largest group of consumers of legal services on an hourly basis in the context of civil rights litigation – public entities. It will allow this Court to resolve a conflict between *Brooks* and *Trevino* and

the First Circuit's decision in *Andrade*. More critically, in addressing this important issue, the Court can further define and clarify what constitute "similar services" for purposes of determining the applicable market in arriving at a fee award under section 1988. Absent intervention by this Court, public entities and their taxpayer citizens will continue to confront a patchwork of decisional law which provides neither predictability nor rationality in the setting of fees awards. This, in turn, makes it virtually impossible for public entities to properly evaluate cases for possible settlement at an early stage and spawns the very sort of protracted fee litigation that this Court has sought to avoid.

ARGUMENT

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE FEDERAL APPELLATE COURTS CONCERNING THE EVIDENCE USED TO ESTABLISH A MARKET RATE FOR PURPOSES OF CALCULATING A FEE AWARD UNDER 42 U.S.C. § 1988.

In its decision in this case, the Ninth Circuit embraced the Eleventh Circuit's reasoning in *Brooks v. Georgia State Board of Elections*, 997 F.2d 857 (11th Cir. 1993), and concluded that the hourly rate paid to private attorneys defending public entities in civil rights litigation is irrelevant in determining the prevailing market rate in the community for purposes of calculating a fee award under section 1988. Citing *Brooks*, the Ninth Circuit expressly held that such evidence was irrelevant because private defense counsel are ostensibly not in the same

"legal market" as attorneys who represent plaintiffs in such litigation. (Appendix to Petition for Certiorari ("App."), p. 27a.)

As noted in the cross-petition for certiorari, the position of the Ninth and Eleventh Circuits on this issue is in direct contravention to the views espoused by the First Circuit in *Andrade v. Jamestown Hous. Auth.*, 82 F.3d 1179 (1st Cir. 1996). In addition, the narrow view of the applicable "market" embraced by the Ninth and Eleventh Circuits leads to an inherent distortion in the marketplace by removing from consideration the hourly fees paid by the single largest body of consumers of civil rights litigation services on an hourly basis – public entities. This, in turn, necessarily leads to inflation of the market rate eventually awarded, since evidence of what plaintiffs' attorneys charge and ostensibly receive for performing civil rights litigation services can, in most circumstances, be obtained only from attorneys who represent plaintiffs in such actions – the very beneficiaries of an inflated market rate.

The conflict between the Ninth and Eleventh Circuits and the First Circuit on this issue would in and of itself warrant certiorari. Moreover, because of the sheer size of the Ninth and Eleventh Circuits, the erroneous rule of law enunciated in *Trevino* and *Brooks* has a profound impact on a large number of public entities and their taxpayers who in the final analysis must pay for such inflated fee awards. Indeed, amici, which are confined to only 79 cities and towns within the State of California, have a collective population of well over one million, and that is only a fraction of the citizens within the jurisdiction of the Ninth Circuit that are directly affected by *Trevino*.

In addition, the narrow definition of market rate applied in *Trevino* and *Brooks* simply underscores a problem that has nationwide impact – lack of uniformity in the nature and type of evidence considered by federal courts in calculating a fee award under section 1988. Just as the individual who succeeds in defining the terms of an argument will generally win it, so too will the party that prevails in defining the type of evidence to be considered in calculating a fee award achieve victory. As one leading treatise has observed: "The elusiveness and volubility of the prevailing market rate in the relevant community make the kind and quality of evidence submitted by the fee applicant critically important to the outcome of the fee-setting process." *2 Section 1983 Litigation: Claims, Defenses and Fees* 216 (2d ed. 1991). If anything, that is putting it mildly. The type of evidence considered by a court in calculating the fee award is not simply "important," but most likely determinative.

In *Blum v. Stenson*, 465 U.S. 886, 895 n.11, this court attempted to define market rates as "rates . . . in line with those prevailing in the community for *similar services* by lawyers of reasonably comparable skill, experience, and reputation." (Emphasis added.) The problem has been, however, that there has been a startling lack of uniformity among the federal courts in determining what constitute "similar services" for purposes of calculating the market rate. While it is logical that hourly rates will vary from one geographic area or "market" to another throughout the country, the factors, and most specifically the evidence, that courts consider in determining the market rate should not. Yet, that is precisely what is occurring.

For example, some courts accept statistical evidence of the hourly rates charged for general legal services in a given community and thus do not confine themselves to evidence of hourly rates charged for litigation services in civil rights cases. *See Soba v. McGoey*, 761 F. Supp. 273, 278 (S.D.N.Y. 1991) (accepting survey of general litigation rates for New York City); *Hall v. Ochs*, 817 F.2d 920, 928 (1st Cir. 1987) (*American Lawyers Guide to Leading Law Firms* provides proof of market rate for general legal services in the applicable area); *Berberena v. Coler*, 753 F.2d 629, 633 (7th Cir. 1985) (accepting *National Law Journal* survey of hourly rates for law firms in large cities). Still other courts reject statistical evidence of general rates on the ground that it is not probative. *See Wiggins v. Heckler*, 639 F. Supp. 126, 128 n.3 (E.D.N.C. 1986) (in calculating attorney's fees under Equal Access to Justice Act, local bar association survey rejected as simply showing rates charged for " 'typical' work" by area attorneys without accounting for type of work performed in the specific case); *Palmer v. Schultz*, 679 F. Supp. 68, 71 (D.D.C. 1988) (rate survey from local referral service irrelevant because it does not address rates charged for complex federal litigation). Some courts accept evidence of what other courts have found the attorneys' rate to be in other litigation,[2] a practice which seems no more logical than allowing a plaintiff to prove his damages by presenting

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[2] *See Coulter v. Tennessee*, 805 F.2d 146, 149-150 (6th Cir. 1986) (attorneys in Title VII suit limited to market rate found by district court in previous Title VII action), *cert. denied*, 482 U.S. 914 (1987); *United Steelworkers v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990); *Cruz v. Local Union No. 3 of Int'l Bhd.*, 34 F.3d 1148, 1160 (2d Cir. 1994) (no need to submit evidence of market rates from attorneys practicing in area where district

evidence of what juries in other cases have awarded similarly injured plaintiffs. Other courts reject or discount such evidence. *See Starnes v. Hill*, 589 F. Supp. 341, 343 (W.D.N.C. 1984) ("What one judge has allowed an attorney in another case carries little weight," since "[e]ach award depends on the facts and circumstances peculiar to the individual case"), *aff'd in part, rev'd in part*, 790 F.2d 1071 (4th Cir. 1986); *Norman v. Housing Auth.*, 836 F.2d 1292, 1304-05 (11th Cir. 1988) (fee awards in other cases "irrelevant" because there is "no assurance that the attorneys in those cases possessed similar skill, experience or reputation or that the case or clients were similar to the [case] at bar"). And, as is evident here, some courts consider evidence of the hourly rates paid to defense attorneys by public entities to be probative of the market rate paid for litigation services in civil rights cases (*Andrade*, 82 F.3d at 1190), while other courts bar consideration of such evidence because defense attorneys are not in the same "legal market" as plaintiffs' attorneys. (App., p. 27a.)

The striking disparity in the evidence considered by federal courts throughout the country on the question of setting market rates for purposes of fee awards under section 1988 mandates the need for clarification by this

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court's award of attorneys fees is supported by "cases in this circuit which supported the per hour rates approved"); *Sellers v. Delgado Community College*, 839 F.2d 1132, 1141 (5th Cir. 1988) (reduction of requested rates proper in order to bring rate into line with market rate awarded by court in similar cases); *McDonald v. Armontrout*, 860 F.2d 1456, 1460-61 (8th Cir. 1988) (rates awarded in other cases provide support for rates set by district court).

Court. It is essential that the Court further define the "market" to be considered by a court in calculating a fee award. Quite simply, must attorneys compete for the same clients (the approach taken by the courts in *Trevino* and *Brooks*) in order to compete in the same "market"? Such a narrow definition of market would appear to be at odds with *Blum*'s emphasis on comparing "similar services" in order to determine the prevailing rate in a particular community.

Further, of course, the Court needs to clarify what it means by "similar services," since the Ninth Circuit's decision in *Trevino* and that of the Eleventh Circuit in *Brooks* indicate that courts are also drawing what appears to be an artificial (and unjustified) distinction between the services performed by plaintiffs' attorneys in litigating civil rights cases and those performed by private defense counsel employed by public entities. This is so despite the fact that putting aside their differing goals in such litigation, the attorneys for both sides largely confront the same tasks in terms of discovery, legal research and trial of a case.

The unpredictability of attorney's fees awarded in civil rights litigation creates a substantial problem for public entities and the courts. The day-to-day reality of modern civil rights practice is that in many cases the attorney's fees awarded to the prevailing party equal, and at times exceed, any monetary award plaintiff receives for his or her injuries, or has a more significant financial impact on a public entity than the underlying injunctive relief. *See McKenzie v. Cooper, Levins & Pastko, Inc.*, 990 F.2d 1183, 1185 (11th Cir. 1993) (upholding lodestar fee of in excess of $100,000 notwithstanding monetary recovery

of only $9,000); *Morales v. City of San Rafael*, 96 F.3d 359, 360-61 (9th Cir. 1996) (damages of $17,500 could support award of $139,783 in attorney's fees); *Guam Soc'y of Obstetricians and Gynecologists v. ADA*, 100 F.3d 691, 695 (9th Cir. 1996) (attorney's fees of $552,790 awarded for striking down anti-abortion statute).

Aside from creating a significant problem in planning and budgeting for potential liability in a given case, this unpredictability hamstrings a public entity in making an informed decision concerning settling an action short of a full-blown trial. As this Court noted in *Marek v. Chesny*, 473 U.S. 1 (1985), a defendant may limit exposure to an attorney's fee award under section 1988 by making an offer of judgment under Rule 68, Federal Rules of Civil Procedure. If the Rule 68 offer is greater than the damages the plaintiff subsequently receives at trial and the amount of attorney's fees it is subsequently determined that the plaintiff's attorney had incurred as of the date of the settlement offer, then the public entity's liability for attorney's fees is cut off as of the date of the settlement offer. *Id.* at 6-7.

Thus, in order to effect a binding Rule 68 offer under *Marek*, it is essential that a public entity be able to estimate with some accuracy not simply the damages sustained by a plaintiff to date, but the attorney's fees incurred as of the date of the offer. A plaintiff's physical and emotional injuries can often be ascertained with some degree of predictability either through review of medical records or even an independent physical or psychological evaluation. The factors to be considered by any potential jury in a case are well known and well defined.

With respect to the potential attorney fee award, a public entity can similarly estimate the number of hours expended by a plaintiff's attorney in litigating the case as of the date of the offer simply by comparing it to the number of hours reasonably expended by its own counsel in defending the case. What is problematic, however, is that because the type of evidence that a district court may consider in determining the hourly market rate for the services of plaintiff's counsel is unpredictable, a defendant cannot reasonably estimate what hourly rate the plaintiff's counsel may subsequently receive from the trial court in the event the plaintiff prevails on the civil rights claim. The result is that few effective Rule 68 offers may be made in the context of civil rights litigation. That in turn means that many cases proceed to trial under circumstances where they might otherwise settle without further court intervention.

Moreover, the unpredictability with respect to the nature of evidence to be considered by a district court in calculating a market rate often leads to the very sort of protracted fee litigation that this Court has sought to avoid. This Court has repeatedly indicated that the purpose of section 1988 is not to spawn "a second major litigation." *Webb v. Board of Educ.*, 471 U.S. 234, 244 n.20 (1985) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). It has similarly decried rules or factors that "make the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable." *City of Burlington v. Dague*, 505 U.S. 557, 566 (1992). However, the "anything goes" rules of evidence with respect to determining market rate gives both plaintiffs and defendants every incentive to produce the greatest

amount and broadest spectrum of evidence in a given case in order to win the battle of defining market rate for purposes of the fee award. As a result, attorney's fees motions generate enormous paperwork and, in direct proportion, consume judicial resources on an ever-growing scale.

The decision of the Ninth Circuit in this case and that of the Eleventh Circuit in *Brooks* precluding courts from considering evidence of the hourly rates paid to private attorneys who defend public entities in determining the market rate for litigating civil rights cases, is flatly contrary to the position taken by the First Circuit in *Andrade* and inconsistent with this Court's decision in *Blum*. *Trevino* and *Brooks* grossly distort the marketplace model in a manner which will invariably inflate fee awards, as they essentially confine relevant evidence in such cases to that procured from the very attorneys who would benefit from fee awards – attorneys who represent plaintiffs in civil rights litigation. The decisions of the Ninth and Eleventh Circuits simply underscore the lack of uniformity in this area and the need for this Court to clarify and refine the definition of "market" and "similar services" for purposes of calculating a fee award under section 1988. Thus, amici respectfully submit that the cross-petition for certiorari should be granted.

CONCLUSION

For the foregoing reasons, amici curiae respectfully submit that the cross-petition for writ of certiorari should be granted.

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Respectfully submitted,

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